Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States
October Term, 1997

JAMES A. LONG, JAMES A. KING, RAYMOND KING, JERRY PATE LONG, HOMER L. LONG, KELVIN KING, TRUMAN SMITH, SAM FULTON, DAVID SWEENEY, JIMMY SWEENEY, JAMES SWEENEY, BOB GRAVES, JOHN RATLIFF, DENNIS RATLIFF, and J. P. RATLIFF,
Petitioners,

v.

FIRSTRUST CORPORATION,
Respondent.

Petition For Writ of Certiorari
To The United States Court of Appeals
For the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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52 pp

QUESTION PRESENTED

Whether state law may permit further collection of a debt after a financial entity has made a report of cancellation of debt income to the Internal Revenue Service and the debtor, pursuant to federal statutes.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Gayle Long, Mary Ann King, Minnie Lee King, Susie Long, Ann Long, Sharon King, Nadaiah Smith, Madge Fulton, Sue Sweeney, Lynette Sweeney, Marianna Graves, Diana Ratliff, Toni Ratliff, Mary Blanche Ratliff and Kenneth T. Turner, were parties before the court of appeals.

TABLE OF CONTENTS

Page

Question Presented i

Parties to the Proceeding ii

Table of Contents iii

Table of Citations iv

Opinions Below 1

Statement of Jurisdiction 1

Constitutional and Statutory Provisions Involved 1

Statement of the Case 3

Reasons for Granting the Writ 5

I. The Petition Should Be Granted Because The Opinion Below Conflicts With This Court's Prior Rulings On The Pre-emptive Effect Of Federal Law Involving A Statutory Scheme For The Report Of Income. 5

II. The Petition Should Be Granted Because The Opinion Below Disregards This Court's Prior Rulings On The Crucial Role Of A District Court Judge As A Trier Of Fact. 11

Conclusion 14

TABLE OF CITATIONS

Page

Cases Cited:

Anderson v. City of Bessemer City, North Carolina, 470 U.S. 564, 105 S. Ct. 1504, 84 L.Ed.2d 518 (1985) 13

Colonial Sav. Assn. and Subsidiaries v. C.I.R., 854 F.2d 1001 (7th Cir. 1988), reh. denied, cert. denied, 109 S. Ct. 1556, 489 U.S. 1090, 103 L.Ed. 2d 859 6

Fidelity Federal Savings and Loan Association v. dela Cuesta, et al., 458 U.S. 141, 149, 102 S. Ct. 3014, 73 L. Ed. 2d 664 (1982) 8

James A. Long, et al. v. Firstrust Corp. 134 F.3d 312 (5th Cir. 1998) 1

Killoran v. C.I.R., 709 F.2d 31 (9th Cir. 1983) 8

Salve Regina College v. Russell, 499 U.S. 225, 233, 111 S. St. 1217, 113 L.Ed. 2d 190 (1991) 12

U.S. v. Kirby Lumber Co., 284 U.S. 1, 76 L.Ed. 131, 52 S. Ct. 4 (1931) 6

United States v. Rodgers, 103 S. Ct. 2132, 461 U.S. 677, 76 L. Ed. 2d 236 (1983) on remand, 712 F.2d 990 8

Contents

Page

Statutes Cited:

26 U.S.C. § 61(a)(12) 2, 6, 13

26 U.S.C. § 108 ..... 2, 6

26 U.S.C. § 6001 6

26 U.S.C. § 6011 6

26 U.S.C. § 6041, et seq. 6

26 U.S.C. § 6050P 3, 6, 10

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 3

28 U.S.C. § 1332 3

28 U.S.C. § 2201 3

United States Constitution Cited:

U.S. Const, Art VI, cl 2 ..... 1, 7

Rules Cited:

Supreme Court Rule 13.1 1

Contents

Page

Other Authority Cited:

47A C.J.S., *Internal Revenue* § 9 (1998) 7

APPENDIX

Appendix A — Opinion of the United States Court of Appeals for the Fifth Circuit Filed February 6, 1998 1

Appendix B — Judgment of the District Court filed October 31, 1996 17

Appendix C — Findings of Fact and Conclusions of Law of the District Court Filed October 31, 1996 19

Appendix D — Order Denying Petition for Rehearing of the United States Court of Appeals for the Fifth Circuit Filed on March 26, 1998 24

Appendix E — Final Judgment on Mandate After Appeal of the District Court Filed May 13, 1998 27

PETITION FOR WRIT OF CERTIORARI

Petitioners, James A Long, et al., respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at *James A. Long, et al. v. Firstrust Corp.*, 134 F.3d 312 (5th Cir. 1998) (App. A). The opinions and judgments of the District Court are unreported (App. B, C & E).

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit is dated February 6, 1998 (App. A). By order filed March 26, 1998 the Fifth Circuit denied Petitioners' petition for rehearing (App. D). The Final Judgment on Mandate After Appeal of the District Court was filed May 13, 1998 (App. E). Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the denial of the petition for rehearing.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause, U.S. Const, Art VI, cl 2, provides in relevant part:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof...shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

26 U.S.C. § 61(a)(12) provides in relevant part:

> §61. Gross income defined
>
> (a) General definition.—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:
>
> (12) Income from discharge of indebtedness;
>
> . . .

26 U.S.C. § 108 provides in relevant part:

> §108. Income from discharge of indebtedness
>
> (a) Exclusion from gross income —
>
> (1) In general.—Gross income does not include any amount which (but for this subsection) would be includible in gross income by reason of the discharge (in whole or in part) of indebtedness of the taxpayer if —
>
> (A) the discharge occurs in a title 11 case, or
>
> (B) the discharge occurs when the taxpayer is insolvent.
>
> . . .

26 U.S.C. § 6050P provides in relevant part:

> § 6050P Returns relating to the cancellation of indebtedness by certain financial entities.
>
> (a) In general.—Any applicable financial entity which discharges (in whole or in part) the indebtedness of any person during any calendar year shall make a return (at such time and in such form as the Secretary may by regulations prescribe) setting forth—
>
> (1) the name, address, and TIN of each person whose indebtedness was discharged during such calendar year,
>
> (2) the date of the discharge and the amount of the indebtedness discharged, and
>
> (3) such other information as the Secretary may prescribe.
>
> . . .

STATEMENT OF THE CASE

The fundamental question in this case is whether a litigant is entitled to relief from a state court judgment when further collection of the judgment is sought by the owner or assignee of the judgment *after* the owner of the judgment has caused to be submitted to the Internal Revenue Service and the debtor a 1099 information return form showing the receipt of income based upon cancellation of the debt.

This suit was instituted as a declaratory judgment action pursuant to 28 U.S.C. § 2201. The jurisdiction of the District Court was invoked under 28 U.S.C. § 1331 and 1332 because of diversity of citizenship, and because there was presented a

federal question involving interpretation and application of federal statutes. The judgment debtors on the state court judgment, Petitioners herein, sought a declaration that the state court judgment was not subject to further collection because the judgment owner had issued a report of income to the Internal Revenue Service and to each of the judgment debtors based upon cancellation of the debt. Further, the issuance of the 1099 information return to the Internal Revenue Service and the judgment debtors was done in conjunction with the "write-off" of the debt on the records of the institution. After such actions by the institution, the state court judgment was assigned, and the assignee sought collection of the full debt represented by the state court judgment.

The Petitioners herein sought relief from the further collection of the state court judgment based upon equitable principles, primarily relying upon the doctrine of quasi-estoppel. Petitioners submitted evidence regarding their receipt of the 1099 information return forms, and evidence that the 1099 forms were based upon a unilateral decision by the financial entity to discharge the debt and report cancellation of debt income to the Internal Revenue Service and the judgment debtors. The District Court found that each of the recipients of the 1099 tax form had a taxable event and that their receipt of income was based upon a discharge of the indebtedness from the judgment debtor (App. C). Further, the District Court found that the write off of the judgment debt and the issuance of the 1099 forms was inconsistent with the further enforcement of the judgment, and that the judgment debt was forgiven (App. C). Based on these findings, the District Court concluded and declared that the state court judgment was not subject to continued enforcement (App. C).

The Fifth Circuit found that the debt was not discharged in that the requisites of Texas law were not met in causing a release or discharge of a debt. The decision of the Fifth Circuit did not draw a distinction between judgment debts and debts arising by notes, or otherwise.

Pursuant to the mandate of the Fifth Circuit, the District Court entered its Final Judgment on Mandate After Appeal, reinstating the state court judgment as to each of the judgment debtors, subject to a credit on the judgment liability for an amount shown to be paid by several of the judgment debtors as taxes on the report of income (App. E).

Petitioners' petition for rehearing was denied (App. D).

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THIS COURT'S PRIOR RULINGS ON THE PRE-EMPTIVE EFFECT OF FEDERAL LAW INVOLVING A STATUTORY SCHEME FOR THE REPORT OF INCOME.

The Petitioners' theory in this case involves the concept of cancellation of debt income, and the inconsistency that would arise when there has been a report of cancellation of debt income to the Internal Revenue Service and the debtor, and subsequently there is a continued collection effort on the debt. A taxpayer is generally treated as realizing taxable income if a debt he owes is forgiven. There is a clear federal statutory scheme for the realization and reporting of

cancellation of debt income. Pursuant to 26 U.S.C. § 61(a)(12), a taxpayer must include in gross income a discharge of indebtedness. The general rule was first espoused in *U.S. v. Kirby Lumber Co.*, 284 U.S. 1, 76 L.Ed. 131, 52 S. Ct. 4 (1931) and further codified in 26 U.S.C. § 108. See also *Colonial Sav. Assn. and Subsidiaries v. C.I.R.*, 854 F.2d 1001 (7th Cir. 1988), reh. denied, cert. denied, 109 S. Ct. 1556, 489 U.S. 1090, 103 L.Ed. 2d 859.

Under the provisions of the Internal Revenue Code, every person made liable for any tax imposed by the Code must make such returns and comply with rules and regulations as may be prescribed. 26 U.S.C. § 6001, 6011. The Code makes provision for filing information returns if there has been a taxable event which may result in reportable income. 26 U.S.C. § 6041, et seq. The various Code sections specify when information returns must be filed to report to the Internal Revenue Service and the individual involved that payments have been made to the individual or other transactions have been entered into which give rise to income. The 1099 forms are the information returns used to report these transactions. Effective after 1993, the provisions of 26 U.S.C. § 6050P specifically relate to discharge of debt by certain financial institutions. Prior to that time, there existed discretion with regard to the submission of an information return which reported income on cancellation of debt. The requirement that the debtor report cancellation of debt income, subject to exclusions, would exist regardless of the receipt of an information return. 26 U.S.C. § 61(a)(12); 26 U.S.C. § 108.

The Fifth Circuit in its opinion properly notes that the "...dispute concerns the legal significance of IRS forms 1099A that were issued by the RTC to appellees..." (App. A).

After reciting the appropriate legal issue, the Fifth Circuit inexplicably fails to acknowledge or discuss the federal statutes which relate to the issuance of the 1099 forms, the concept of cancellation of debt income, the inconsistency of issuing 1099 tax forms and continuing to collect the debt, the statutory and regulatory requirements for information returns, or the pre-emptive effect to be given to the federal statutory scheme for reporting cancellation of debt income.

Further, the Fifth Circuit in its discussion states that,

> ...the primary issue we are asked to decide is whether, under Texas law, a creditor releases a debt by issuing to the debtor an IRS form 1099A in respect thereto and then writing the debt off.

In answering this issue, the Fifth Circuit relies entirely upon Texas law pertaining to release of a debt, rather than follow its own characterization of the dispute concerning the "legal significance" of 1099 tax forms.

Generally, the interpretation and application of the federal revenue act is governed by federal law rather than by state law which may vary from state to state, and the application of state law would cause inequities and conflicts. See generally 47A C.J.S., *Internal Revenue* § 9 (1998). Federal taxation statutes involve a nationwide scheme of taxation, and there must be uniform application of the statutes without interference or conflict with state law. Petitioners submit that the Fifth Circuit erroneously denied pre-emptive effect to the federal statutory scheme relating to report of cancellation of debt income. The supremacy clause of the Federal Constitution nullifies state law to the extent that it actually conflicts with federal law. U.S. Const, Art VI, cl 2;

Fidelity Federal Savings and Loan Association v. dela Cuesta, et al., 458 U.S. 141, 149, 102 S. Ct. 3014, 73 L. Ed. 2d 664 (1982). The pre-emption of state law may be either expressed or implied, and the pre-emption is compelled whether congress' command is expressly stated in the statute's language or impliedly contained in its structure and purpose. *Id.* at 675. Federal regulations have no less pre-emptive effect than federal statutes. *Id.* at 675.

The relevant federal statutes pertain to the definition of income and the reporting requirements on the realization of income. The federal tax collection scheme and the consequences that are attached to those interests are matters left to federal law. *United States v. Rodgers*, 103 S. Ct. 2132, 461 U.S. 677, 76 L. Ed. 2d 236 (1983) on remand, 712 F.2d 990.

In pre-emption situations, it is appropriate to consider if compliance with both federal and state regulations or laws is a physical impossibility. *Fidelity Federal Savings and Loan Association v. dela Cuesta, et al.*, at 675. It is submitted that the inconsistency noted does create a "physical impossibility," and that the state law cited by the Fifth Circuit stands as an obstacle to accomplishment of the full purposes and objectives of Congress. The federal statutory scheme would be rendered ineffective if the financial entity was in each instance of discharge of debt required to determine and interpret the appropriate law of the state as to whether there had been a contractual or statutory discharge of debt.

Issues as to what constitutes income for federal tax purposes are controlled by federal law. *Killoran v. C.I.R.*, 709 F.2d 31 (9th Cir. 1983). The District Court found that the judgment debtors were recipients of income based upon the

discharge of the indebtedness from the judgment creditor (App. C). The Fifth Circuit ignores the District Court finding that there was a taxable event on the discharge of indebtedness, and finds that based on Texas law, the judgment debtors were not released from liability on the judgment and that they were not therefore recipients of income (App. A, Note 3). This represents a clear statement by the Fifth Circuit that Texas law controls in the determination of "income," and the Fifth Circuit fails to recognize the pre-emptive effect that must be given federal tax legislation. The only rationale expressed by the Fifth Circuit regarding the findings of the District Court on the existence of a taxable event, and the receipt of income, is the claimed controlling effect of Texas law regarding release of debts.

It is obvious that compliance with the federal income tax collection scheme is in direct conflict with the Fifth Circuit's opinion that state law would override a decision of a financial entity to discharge a debt and report the cancellation of debt income to the Internal Revenue Service and the debtor. The Fifth Circuit's decision allows a financial entity to make a unilateral decision to discharge a debt and notify the Internal Revenue Service of the cancellation of debt thereby creating a potential tax liability to the debtor, and yet leave the debtor fully liable on the debt. The inconsistency is obvious, and there is no prior legal precedent that the issuance of a 1099 tax form based upon cancellation of debt income is obviated by state law.

Neither the Respondent herein, as owner and holder of the state court judgment, nor any lower Court has denied that the report of cancellation of debt income would be totally inconsistent with further collection of the same debt. Rather

than acknowledge this inconsistency and attempt to distinguish or explain how the two positions could exist simultaneously, the Respondent and the Fifth Circuit instead focus on the elements of Texas law regarding contractual or statutory release of debt. The Fifth Circuit decision does not restrict its holding to pre-§ 6050P factual situations, and the decision would be current authority for the proposition that a financial entity can follow the mandate of the federal statute as to report of cancellation of debt income, and yet leave the debtor fully liable on the debt.

The uncertainty created by this Fifth Circuit's decision will impact the Internal Revenue Service, financial entities seeking to comply with the statutory requirements, and the reporting requirements and tax liability of the debtor. Numerous issues are created by this Fifth Circuit's decision, including whether the Internal Revenue Service can compel the report of cancellation of debt income by the debtor, when the debtor remains fully liable on the debt; whether a financial entity incurs liability by making a unilateral decision to cancel a debt and report the cancellation of debt income to the Internal Revenue Service while leaving the debtor subject to continued collection of the debt; and whether the debtor is subject to federally imposed penalties and sanctions for failing to report cancellation of debt income for the reason that he is deemed to remain fully liable on the discharged debt.

The realization of income and reporting requirements on cancellation of debt income as mandated by federal law should not be dependent upon any particular state's law regarding release or discharge of debts. The uncertainty and confusion caused by application of this Fifth Circuit's decision is enormous.

In summary, this case presents a clear situation of the intrusion of state law to thwart a federal tax statutory scheme for properly defining and reporting income. The decision of the Fifth Circuit has national implications in that it permits state law to supersede a determination by a financial entity to discharge a debt on its books, and to cause a report of income to the debtor based upon such discharge. The Fifth Circuit's failure to acknowledge the federal statutes pertaining to cancellation of debt income, and to rely entirely upon Texas law, is erroneous, and should not stand as a national legal precedent on the issues. The Fifth Circuit fails to acknowledge the pre-emptive effect of federal laws regarding the definition and reporting of income, which defies this Court's longstanding holdings that state laws will not be allowed to impede a federal statutory scheme involving nationwide application. By granting this petition for writ of certiorari, this Court can correct the Fifth Circuit's decision and reaffirm that federal statues will be given pre-emptive effect when there exists a conflict with state law.

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW DISREGARDS THIS COURT'S PRIOR RULINGS ON THE CRUCIAL ROLE OF A DISTRICT COURT JUDGE AS A TRIER OF FACT.

The District Court, based upon abundant evidence, concluded that on the issuance of the 1099 tax forms,

> ...in addition to the indebtedness being forgiven, each plaintiff recipient had a taxable event. They became a recipient of income based upon a

> discharge of the indebtedness from the judgment creditor, and therefore could not continue to be liable on the same indebtedness that was subject to the discharge (App. C).

Although stated within a conclusion of law (App. C), the District Court's findings that there existed a taxable event, that there was a receipt of income, and that there was a discharge of the indebtedness, are factual determinations which set the basis for the conclusion of law that the judgment defendants, Petitioners herein, could not continue to be liable on the indebtedness. If it is determined that these findings were not purely factual, then it is submitted that such findings involve mixed questions of fact and law, and that as such the District Court findings are entitled to deferential review. *Salve Regina College v. Russell*, 499 U.S. 225, 233, 111 S. St. 1217, 113 L.Ed. 2d 190 (1991). This Court has held that deferential review of mixed questions of law and fact is warranted when it appears that the District Court is "better positioned" than the appellate court to decide the issue in question or that probing appellate scrutiny will not contribute to the clarity of legal doctrine. *Id.* at 199.

As a factual matter, the District Court found that the "write off of the judgment debt and the issuance of the 1099 forms was inconsistent with the further enforcement of the judgment" and that "the judgment debt was forgiven" (App. C). The Fifth Circuit in Note 3 of its decision concludes that,

> as we hold that the issuance of the 1099s did not discharge plaintiffs' liability on the judgment, it follows that they did not thereby become 'a recipient of income based upon a discharge of the

> indebtedness from the judgment creditor' (App. A).

It is submitted that this presents an improper argument to contradict the District Court's findings of fact and conclusions of law. Whether the judgment debtors were "a recipient of income based upon a discharge of the indebtedness..." would be determined by federal law regarding the definition of income. The statement by the Fifth Circuit in Note 3 is in direct contravention of 26 U.S.C. § 61(a)(12). The Fifth Circuit attempts to use its reasoning concerning release of a debt based upon Texas law to finally determine whether income had been generated by the discharge of indebtedness. Had the Fifth Circuit properly given pre-emptive effect to the federal law concerning realization of income and the reporting requirements on cancellation of debt income, the finding by the Fifth Circuit could not be made. The Fifth Circuit's decision presents a clear example of the need to give pre-emptive effect to the federal tax scheme in order to prevent conflicting decisions from multi-jurisdictions regarding the realization of income.

This Court has limited the appellate court's standard of review in *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564, 105 S. Ct. 1504, 84 L.Ed.2d 518 (1985). In that decision this court stated that,

> If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two

> permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.
>
> The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise.

Id. at 528-529. It is submitted that the Fifth Circuit failed to acknowledge the important fact-finding responsibility of the District Court. This is particularly evident when it is seen that the Fifth Circuit relies upon Texas law to characterize a "taxable event" and "receipt of income," when those fact determinations were peculiarly within the fact-finding responsibilities of the District Court and the District Court's findings thereon were in full compliance with federal law.

CONCLUSION

Petitioners, James A. Long, et al., respectfully request that their petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals,

Fifth Circuit

No. 96-11468.

James A. LONG, and wife; James A. King, and Wife; Raymond King, and wife; Jerry Pate Long, and wife; Homer L. Long, and wife; Kelvin King, and wife; Truman Smith, and wife; Sam Fulton, and wife; David Sweeney, and wife, Jimmy Sweeney, and wife; James Sweeney; Bob Graves, and wife; John Ratliff, and wife; Dennis Ratliff, and wife, J.P. Ratliff, and wife, Plaintiffs-Counter Defendants-Appellees-Cross Appellants,

Gayle Long; Mary Ann King; Minnie Lee King; Susie Long; Ann Long; Sharon King; Nadaiah Smith; Madge Fulton; Sue Sweeney; Lynette Sweeney; Mariana Graves, Diana Ratliff, Toni Ratliff, Mary Blanche Ratliff, Plaintiffs-Counter Defendants-Appellees,

v.

Kenneth T. TURNER, Individually, Defendant-Counter Claimant,

and

Firstrust Corporation, Defendant-Counter Claimant-Appellant-Cross Appellee.

Feb. 6, 1998.

Appeals from the United States District Court for the Northern District of Texas.

Before GARWOOD, DUHÉ and DeMOSS, Circuit Judges.

GARWOOD, Circuit Judge:

Plaintiffs-appellees Long, *et al.*, (appellees) brought this Texas law diversity action against defendant Kenneth Turner (Turner), individually, and defendant-appellant Firstrust. Corporation (Firstrust) seeking a declaratory judgment, pursuant to 28 U S.C. § 2201, that appellees had been released from liability on a judgment by the Resolution Trust Corporation (RTC), Firstrust's predecessor in interest as owner of the judgment. Firstrust now appeals the district court's determination that the debt had been released through the issuance of Internal Revenue Service (IRS) forms 1099A and that Firstrust is not entitled to attorneys' fees. Appellees cross-appeal the denial of their attorneys' fees. Concluding that the district court misapplied Texas law concerning the release of a debt, we reverse the declaratory judgment, but affirm the court's decision denying attorneys' fees to both parties.

Facts and Proceedings Below

The current dispute concerns the legal significance of IRS forms 1099A that were issued by the RTC to appellees, who owed an outstanding judgment, then owned by the RTC., on an unpaid loan that they had guaranteed.

The fifteen male appellees guaranteed a loan from MeraBank, Texas, FSB to I.G,P., Inc. in 1984. When the loan went unpaid, MeraBank pursued the debt against the eighteen guarantors and the borrower, I.G.P., and eventually obtained a judgment on August 23, 1990, for the principal of $113,000, plus attorneys' fees and interest, against appellees jointly and severally.

Shortly thereafter, in 1991, MeraBank experienced financial difficulties of its own, the immediate result of which was that the Office of Thrift Supervision ordered a pass-through receivership into a new entity (New MeraBank Texas, FSB) that was placed into conservatorship with the RTC. As conservator, the RTC assumed control over New MeraBank's assets, including the I. G.P. loan and the outstanding judgment against appellees.[1]

In January 1992, while New MeraBank was in conservatorship, an IRS form 1099A, entitled "Acquisition or Abandonment of Secured Property," was issued by New MeraBank in its name to each appellee (in respect to calendar year 1991) reflecting his *pro rata* share of the outstanding judgment principal, excluding attorneys' fees and interest.[2] The district court found that the 1099s were issued "so that the borrower/judgment debtor could report on his or her [federal income] tax return the event of the forgiveness of the indebtedness and the benefit conferred, "M Two months later, in March 1992, the "Asset Manager" of the RTC, in its capacity as conservator of New MeraBank, made a request to write off the I.G.P. promissory note.[4] The write-off request was approved by the RTC Managing Agent on March 17, 1992, and the loan file was transferred to the RTC's Asset Recovery Division. On April 3, 1992, the New MeraBank

went into receivership, with the RTC acting as receiver.

On November 15, 1992, in its capacity as New MeraBank's receiver, the RTC sold the outstanding August 23, 1990, judgment. The RTC executed a "Quitclaim Assignment of Judgment," which transferred the RTC's rights under the judgment against appellees to Firstrust Corporation without recourse, representation, or warranty.

Thereafter, much to the dismay of appellees, Firstrust attempted to collect on the judgment and initiated a state court garnishment action. Believing that the judgment debt had been released by the RTC, as conservator of New MeraBank, appellees brought the instant action, seeking a declaration from the district court that the debt had been discharged by the issuance to them of the 1099A forms. Additionally, they also asserted claims of wrongful garnishment, conversion, unreasonable collection efforts, and negligence.

The case was tried to the court without a jury in July 1996. The district court, in its Findings of Fact and Conclusions of Law, ruled that the RTC, in its capacity as conservator of New MeraBank, had entirely released appellees of the judgment debt through its issuance to them of the 1099A forms, and, thus, that the judgment which Firstrust had subsequently purchased from the RTC was no longer enforceable against appellees. The court denied appellees other claims, found no liability as to Turner individually, and did not award attorneys' fees to either party,

We reverse the district court's ruling as to the release of the judgment debt through issuance of the 1099A forms, but affirm the court's denial of attorneys' fees to both parties.[5]

Discussion

1. Enforceability of the Judgment

In this appeal, the primary issue we are asked to decide is whether, under Texas law, a creditor releases a debt by issuing to the debtor an IRS form 1099A in respect thereto and then writing the debt off.

The district court found that "the issuance of the 1099A forms by the RTC evidenced their intent to forgive the debt . ., and their intent to write off the judgment debt." The court also found that "the write-off of the judgment debt and the issuance of the 1099 forms was inconsistent with the further enforcement of the judgment" and that "[t]he judgment debt was forgiven." In its conclusions of law, the court determined that "the RTC released the judgments when they issued the 1099 forms," "[t]he judgment involved in this case is not subject to continued enforcement," and " [t]he judgment being satisfied by the issuance of a 1099, that event occurring before assignment of the judgment creditor (RTC), the satisfaction thus bars the assignee (the defendant FirstTrust Corporation) from enforcing the judgment." The court did not cite any principle of Texas law that would lend credence to these conclusions concerning release, satisfaction, or discharge of the judgment debt. In its judgment, the district court declared "that the Resolution Trust Corporation released judgments [sic] against the Plaintiffs ... so that Defendants cannot now collect from Plaintiffs on those judgments [sic]."

Even if the court was correct that the issuance of a 1099A form is evidence of an intent in some sense to "forgive" the debt, we find, as a matter of Texas law, that such an intent

alone is insufficient to release or discharge a debt.[6] Furthermore, we hold that a write-off of a debt on the creditor's books is an accounting practice that does not of itself amount to a discharge or release of the debt.

A. Release or Discharge of Debt

It is well established in Texas that the mere communicated intent to forgive, without some further action by the creditor or debtor, cannot be the basis of a debt release or discharge. The general principle is that without additional consideration, a debtor's part-payment of a liquidated debt does not constitute an accord and satisfaction, even if the creditor and debtor agree that the debt is thereby discharged. *See Jenkins v. Henry C. Beck Co.*, 449 S.W.2d 454, 455 (Tex. 1969) (setting out the requirements of accord and satisfaction), *Jeanes v. Hamby*, 685 S.W.2d 695, 697 (Tex. App. --Dallas 1984, writ ref'd n. r. e) (holding that the payee of a note who had obtained a judgment against guarantors did not release the judgment by executing a release in exchange for a part-payment of the judgment); *Mathis v. Bill De La Garza & Associates*, 778 S.W.2d 105, 107 (Tex. App.--Texarkana 1989, no writ) (holding that "the mere payment and acceptance of a sum of money less than the amount of an *undisputed* indebtedness does not constitute an accord and satisfaction,") (emphasis in original); 1 Tex.Jur.3d *Accord and Satisfaction* § 11 (1993).

While consideration is not necessary for a debt to be discharged by gift -from the creditor to the debtor, here appellees did not claim below (in their final amended complaint or in the pretrial order) that New MeraBank (or the RTC) had made any gift to them, and the district court made

no finding or conclusion that there had been any gift. Nor would the evidence sustain any such finding. "The person claiming that a gift was made must prove the gift by clear and convincing evidence." *Dorman v. Arnold*, 932 S.W.2d 225, 227 (Tex.App. Texarkana, 1996, n.w.h.). "To constitute a gift inter vivos there must not only be a donative intention, but also a complete stripping of the donor of all dominion or control over the thing given. "*Peterson v. Weiner*, 71 S.W. 2d 544, 546 (Tex. Civ. App. San Antonio, 1934, writ ref'd) (no gift of note or debt represented thereby from holder to maker where former retains note).[7] Here there was plainly no "complete stripping" of New MeraBank "of all dominion or control over" the judgment debt. Although the 1099A forms do refer to "Promissory Note & Guaranty Agreement," the Promissory note and guaranty agreement on which the judgment was based were retained by New MeraBank (until transferred to Firstrust) and were not destroyed, endorsed, or marked "canceled," "released," "discharged" (or "paid"), or the like, and no express transfer or release of the note or guaranty was ever executed or delivered. The judgment is not mentioned in the 1099A forms. No purported transfer (other than to Firstrust), satisfaction, discharge, cancellation, or release of the judgment has ever been executed or delivered or noted in the records of the court entering the judgment or elsewhere.[8]

There is no evidence that appellees gave consideration in exchange for a debt forgiveness, or that New MeraBank (or the RTC) in any way divested itself of control or title to the note and guaranty and outstanding judgment by issuing the 1099A forms and writing off the debt. While the issuance of a 1099A form may reflect an intent in some sense to forgive the debt, it does not on its own have the legal effect of

releasing or discharging the debt.

The fact that the New MeraBank subsequently "wrote off" the debt on its books (a fact never communicated to appellees) is even less significant than the 1099A forms. A write-off is merely an accounting practice or convention for reducing to zero the value of an asset as shown on a balance sheet. *See A Dictionary of Accounting 343* (R. Hussey ed., 1995) (defining "write-off"). A bad debt that has been written off may still be recovered in the future and written back on the books again, Id at 39 (defining "bad debt recovered"). Thus, writing off a bad debt merely reflects the creditor's determination at the time that none of the debt is then either collectible or has any likelihood of ever becoming so, or that any collection expenses will likely exceed receipts, but it does not constitute a legally effective discharge or release of the indebtedness and it does not imply that the creditor intends to thereby legally divest himself of ownership of the debt or to legally preclude any further efforts to collect.

Since there was neither an accord and satisfaction nor a completed gift, it would be anomalous for us to uphold the district court's finding that the RTC released the debt without receiving any payment or relinquishing title to or control over the note, guaranty, or judgment. To hold otherwise would be a dramatic departure from settled Texas law.

B. Estoppel

As they did below, appellees invoke the somewhat amorphous doctrine of quasi-estoppel. This form of estoppel does not, at least normally, require either misrepresentation by the party to be estopped or detrimental reliance by the

party invoking the estoppel. *See Stimpson v. Plano Indep. School Dist.*, 743 S.W.2d 944, 946 (Tex. App. --Dallas 1987, writ denied), *Cf. Matter of Davidson*, 947 F.2d 1294, 1297 (5th Cir. 1991) (" [a]lthough detrimental reliance is not a necessary element of quasi-estoppel, we find that the existence of detrimental reliance in this case is an important factor" in determining to apply quasi-estoppel). Appellees rely on general statements in Texas intermediate appellate court opinions to the effect that quasi-estoppel "applies when it would be unconscionable to allow a person to maintain a position inconsistent with one in which he acquiesced, or of which he accepted a benefit,"*Vessels v. Anschulz Corp.*, 823 S.W.2d 762, 765-66 (Tex. App. --Texarkana 1992, writ denied), or "precludes a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken by him."*El Paso Nat. Bank v. S. W. Numismatic Inv. G.*, 548 S.W.2d 942, 948 (Tex.Civ.App.--El Paso 1977, n.w.h.). But these overly general statements cannot be taken entirely literally, else every promise or assertion made would be judicially enforceable even though wholly unsupported by any consideration or reliance whatever and even though no benefit to the promisor or assertor, nor detriment to the other party, accrued by reason of the making of the promise or assertion. Actually, quasi-estoppel was not applied in either *Vessels or El Paso Nat. Bank*. Indeed, *Vessels* goes on to explain that "one who retains benefits under a transaction cannot avoid its obligations and is estopped to take an inconsistent position, "*Id* at 766, citing *Theriot v. Smith*, 263 S.W.2d 181, 183 (Tex. Civ. App. --Waco 1953, writ dism'd) ("[o]ne who retains benefits under a transaction cannot avoid its obligations, and is estopped to take a position inconsistent therewith"). This seems to be more a precise description of the core basis of equitable estoppel. *See, e.g., Atkinson Gas*

Co. v. Albrecht, 878 S.W.2d 236, 240 (Tex.App.--Corpus Christi 1994, writ denied) ("... quasi-estoppel forbids a party from accepting the benefits of a transaction or statute and then subsequently taking an inconsistent position to avoid corresponding obligations or effects"); *Mexico's Industries, Inc. v. Banco Mexico Somex*, 858 S.W.2d 577, 581 n. 7 (Tex.App.--El Paso 1993, writ denied) (same); *Matter of Davidson*, 947 F.2d 1294, 1297 (5th Cir. 1991) (same); *Turcotte v. Trevino*, 499 S.W.2d 705, 712 (Tex.Civ.App. -- Corpus Christi 1973, n.r.e.) (by virtue of estoppel "[w]here one having the right to accept or reject a transaction takes and retains benefits thereunder, he ordinarily ... cannot avoid its obligation or effect by taking a position inconsistent with it at a later time"). Here, there was never any transaction between or involving appellees and New MeraBank and the issuance of the 1099As was the entirely unilateral, unsolicited act of New MeraBank for or in relation to which New MeraBank received nothing from appellees (or anyone else). Indeed, there is no finding or evidence that New MeraBank received any benefit whatever from the issuance of the 1099As, either they may have reflected some character of forgiveness of the debt or even insofar as they may merely have reflected New MeraBank's determination that the debt was worthless. Quasi-estoppel has been held inapplicable where the conduct allegedly giving rise to the estoppel is not shown to have benefited the party sought to be estopped. *Stimpson* at 946. Indeed, even where some benefit has been received from the opposite party, quasi-estoppel is not always applied. *Atkinson Gas Co.* at 240. We hold that quasi-estoppel is inapplicable here.

All this is not to say that in analogous circumstances those in a position generally similar to that of appellees would

necessarily be without any recourse. In such a situation, equitable estoppel may likely afford relief, as may also a claim for negligent misrepresentation, *provided* in each case that there is a showing of, *inter alia*, detrimental reliance. *See, e.g., Federal Land Bank v. Sloane*, 825 S.W.2d 439, 442 (Tex. 1991) (negligent misrepresentation claim requires detrimental reliance); *Gulbenkian v. Penn*, 151 Tex. 412, 252 S.W.2d 929, 932 (1952) (equitable estoppel requires detrimental reliance. Here, however, there is no evidence or finding of any detrimental reliance whatever by any of the appellees other than Dennis Ratliff, John Ratliff, and Truman Smith (see note 3, *supra*). Hence, none of the appellees other than these three is entitled to any relief whatever, Appellant at oral argument advised that it had no objection to awarding Dennis Ratliff, John Ratliff, and Truman Smith a credit on their liability on the August 1990 judgment to the extent of the federal income taxes they paid in reliance on the 1099As ($1,059.39 each for Dennis Ratliff and John Ratliff and $1,050 for Truman Smith), and we thus hold those three appellees are entitled to such a credit. Because this is the extent of the detriment shown to be suffered by each of these three, none is entitled to any further relief or to complete cancellation of the indebtedness. *See, e.g., Sloane* at 443 (negligent misrepresentation damages limited to reliance damages); *Sun Oil Co. v. Madeley*, 626 S.W.2d 726, 734 (Tex, 198 1) ("The damages recoverable by a party claiming estoppel are limited to the amount necessary to compensate that party for a loss already suffered"); Keado *v. United States*, 853 F. 2d 1209, 1218 (5th Cir, 1988) ("Recovery under an estoppel theory is limited to the amount necessary to compensate for the loss suffered "and " "One recovering under promissory estoppel should not experience a windfall").

II. Attorneys' Fees

Appellant and appellees (by cross-appeal) each complain of the district court's denial of their respective requests for an award of attorneys' fees. We reject all these contentions, concluding that neither appellant nor appellees have demonstrated reversible error in the district court's rulings in this respect.

Conclusion

We conclude that the district court erred by granting any relief to appellees other than Dennis Ratliff, John Ratliff, and Truman Smith, and that as to said three appellees no relief should be awarded other than a credit on their liability on the principal amount of the August 1990 judgment in the amount of $1,059.39 each for Dennis Ratliff and John Ratliff and $1,050 for Truman Smith (said credit in each case to be as of the date each of said parties respectively paid said amounts to the IRS in respect to the 1099As issued them by New MeraBank).

Accordingly, the judgment of the district court is affirmed in part and reversed in part, and the cause is remanded for entry of judgment in conformity herewith.

AFFIRMED in part; REVERSED in part; CAUSE REMANDED with instructions.

1. [1]As a matter of convenience, we have referred to the RTC as "owner" of the judgment. That is not technically correct. Since the RTC was a conservator, rather than a receiver, it merely gained control, not ownership, of New MeraBank's assets. The assets were owned by New MeraBank, and thus

the transactions at issue in this case concerning former MeraBank assets were ordered by the RTC but were ultimately executed by it in New MeraBank's name and on its behalf

2. [2]The original judgment of $113,000 was rendered jointly and severally against eighteen guarantors and I. G.P. It appears from the record that only sixteen 1099A forms in the amount of $7062.50 each were issued (for a total of $113,000). Each of the male appellees received one, and the sixteenth 1099A form was sent to a guarantor who is not a party to the current litigation. The "Description of Property" block on each form contains the words "Promissory Note & Guaranty Agreement." There is no reference to the judgment. The forms are unsigned.

3. [3]The district court found that "[s]ome of the plaintiffs reported income as a result of the 1099A on their 1991 (federal income] tax form and some did not." This is the only finding made as to any income tax payments or reporting by plaintiffs; no finding is made as to any assessment by the IRS or any actual liability to the IRS in regard to the subject matter of the 1099As on the part of any individual plaintiff or plaintiffs collectively, The only evidence of any income tax payments made (or reported or assessed as owing) as a result of, or in relation to, the 1099As or their subject matter, are payments of $1,059.39 each by plaintiffs Dennis Ratliff and John Ratliff and $1,050 by plaintiff Truman Smith. In its conclusions of law, the district court opined

"[w]hen the 1099s were issued, in addition to the indebtedness being forgiven, each plaintiff recipient had a taxable event. They became a recipient of income based upon

a discharge of the indebtedness from the judgment creditor.... Whether or not they paid the IRS what they owed on their 1991 1040 is of a matter between them and the IRS and is not before the Court." As we hold that the issuance of the 1099s did not discharge plaintiffs' liability on the judgment, it follows that they did not thereby become "a recipient of income based upon a discharge of the indebtedness from the judgment creditor."

4. [4]In its request, the RTC noted, as "reasons for write off," that: I.G.P. and James Sweeney, a guarantor and appellee, were in bankruptcy; another guarantor, Howard Watson III, had already been discharged from bankruptcy; H.H. Adams, a guarantor, had passed away and his estate had settled for $7,000; and the loan amount was not big enough to warrant asset searches on the fifteen remaining guarantors. The request asks for permission "to write the loan balance to zero."

5. [5]No appeal has been taken from the district court's denial of the other claims.

6. [6]Because intent alone is insufficient, we need not reach the issues of whether there was sufficient evidence that the RTC intended to "forgive" the debt or whether the issuance of a 1099A form reflects such an intent as matter of law,

7. [7]*See also, e.g., Cogdill v. First National Bank of Quitaque*, 193 S.W. 2d 701, 702 (Tex.Civ.App.Amarillo 1946, n.w.h,) ("... to establish a gift ... it is necessary to prove both the delivery of the subject matter by the donor to the donee and the intention to vest in the donee unconditionally and immediately the ownership of the property delivered"); *O'Donnell v. Halladay*, 152 S.W.2d 847, 850-51

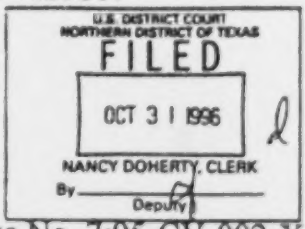
(Tex.Civ.App., El Paso 1941, ref'd w.o.m.) ("In order that there be an effective gift ... there must be a delivery to or for the benefit of the donee.... By 'deliver' in this sense is meant a surrender of possession of the property, or the symbol of the property, to the donee, with the intention and purpose of then vesting title in the donee"); *Benavides v. Laredo National Bank*, 91 S.W.2d 372, 374 (Tex. Civ.App.Eastland 1936, n.w.h.) (no gift unless donor " "has divested himself absolutely and completely of the title, dominion, and control of the subject of the gift"); *Harmon v. Schmitz*, 39 S.W.2d 587, 589 (Tex.Com.App. 1931) (gift requires that the donor have effected " "the irrevocable transfer of the present title, dominion, and control of the thing given, so that the donor can exercise no further act of dominion or control over it'"; the required "delivery must be not only of possession, but also of dominion and control'"; and " "the intention [to make gift] must be effected by a complete and unconditional delivery").

8. [8]Moreover, New MeraBank's issuance of the 1099As--a wholly unilateral, unsolicited act--does not of itself constitute the "clear and convincing evidence" necessary to establish the donative intent required for gift. There is no evidence of any relationship between appellees and New MeraBank other than that of judgment debtor-creditor on a business debt, and nothing suggests that appellees were ever actual or potential customers of New MeraBank. The 1099As may reflect New MeraBank's business decision not to thereafter seek to collect any of the debt or deal with it as to any extent potentially collectible or valuable. However, there is no clear and convincing evidence that a purpose of issuing the 1099As was to thereby effect a transfer to appellees of title and ownership of the debt, as opposed to merely complying with what was thought to be required by IRS or RTC regulations, had more

than the latter been intended doubtless some more customary or formal method of handling the matter would have been employed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION



JAMES A. LONG, et al, §
§
Plaintiffs, §
§
vs. § Case No. 7:95-CV-002-X
§
KENNETH T. TURNER, et al, §
§
Defendants. §

ENTERED ON DOCKET
11-1-96 PURSUANT
TO F.R.C.P. RULES
58 AND 79A

FINAL JUDGMENT

This case having come to trial before the Court, in accordance with the Findings of Fact and Conclusions of Law filed today, the Court declares that the Resolution Trust Corporation released judgments against the Plaintiffs based on a Note and Guarantee Agreements Plaintiffs had signed, so that Defendants cannot now collect from the Plaintiffs on those judgments. It is hereby ORDERED, ADJUDGED and DECREED that all parties take nothing on their claims against each other, and that each party shall bear his own costs and attorney's fees.

SO ORDERED this 31st day of October, 1996.

/s/ Joe Kendall
Joe Kendall
U.S. District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

JAMES A. LONG and wife, GAYLE LONG; JAMES A. KING and wife, MARY ANN KING; RAYMOND KING and wife, MINNIE LEE KING; JERRY PATE LONG, and wife, SUSIE LONG; HOMER L. LONG and wife, ANN LONG; KELVIN KING and wife, SHARON KING; TRUMAN SMITH and wife, NADAIAH SMITH; SAM FULTON and wife, MADGE FULTON; DAVID SWEENEY and wife, SUE SWEENEY; JIMMY SWEENEY and wife, LYNETTE SWEENEY; JAMES SWEENEY; BOB GRAVES and wife, MARIANNA GRAVES; JOHN RATLIFF and wife, DIANA RATLIFF; DENNIS RATLIFF and wife, TONI RATLIFF; J.P. RATLIFF and Wife, MARY BLANCHE RATLIFF,

Plaintiff,

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
OCT 31 1996
NANCY DOHERTY, CLERK
By _____ Deputy

CIVIL ACTION NO.
7:95-CV-002-X

ENTERED ON DOCKET
1-11-96 PURSUANT
TO F.R.C.P. RULES
58 AND 79A

vs.	§
	§
KENNETH T. TURNER,	§
individually and FIRSTRUST	§
CORPORATION,	§
	§
Defendant.	§

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case was tried before the Court without a jury and after hearing the evidence, including but not limited to Plaintiffs' Exhibits 22, 25 and the Plaintiffs' highly credible expert, and after considering the argument of counsel and relevant authority, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Male plaintiffs in this case signed a Guarantee Agreement guaranteeing a promissory note signed in 1984.

2. On June 1, 1987 a "Modification Agreement* was signed by the male plaintiffs.

3. The note was not paid. On August 23, 1990 a state district court in Tarrant County, Texas entered a Judgment in favor of MeraBank, Texas, FSB against the male plaintiffs, jointly and severally. The amount of the Judgment was $113,000.00 in principal, $5,006.85 in interest through August 23, 1990, reasonable attorney's fees of $6,289.40, and it was ordered that the Judgment would bear interest at the highest rate allowed by law from the date of Judgment until paid.

4. After several name changes, the financial institution holding the Judgment on the note and Guarantee

Agreements ended up in the hands of the Resolution Trust Corporation (RTC).

5. The RTC as conservator of New MeraBank Texas, FSB, caused to be issued a Form 1099A to each of the male plaintiffs herein for the tax year 1991.

6. Some of the plaintiffs reported income as a result of the 1099A on their 1991 tax form and some did not.

7. Review of the exhibits and the credible evidence, including the testimony of the plaintiffs' expert (a former RTC employee), causes the Court to believe that the issuance of the 1099A forms by the RTC evidenced their intent to forgive the debt and the issuance of the 1099A forms, from their practice, did indeed evidence their intent to write off the judgment debt.

8. The write off of the judgment debt and the issuance of the 1099 forms was inconsistent with the further enforcement of the judgment.

9. The judgment debt was forgiven.

10. The banking industry generally and the RTC particularly intended to forgive debt when they issued 1099 forms to borrowers or judgment debtors. This was so that the borrower/judgment debtor could report on his or her tax return the event of the forgiveness of the indebtedness and the benefit conferred.

11. The defendant in this case, Firstrust, Corporation, purchased a package of judgments from the RTC. This was done after the issuance of the 1099s by the RTC. Ile terms of the sale by the RTC to the defendant specifically stated that no warranties, expressed or implied, were being made as to the enforceability, collectability, etc. of the judgments and further made no representations as to any defenses that might lie. In essence, the RTC told defendant that the defendant Firstrust Corporation should apply the maxim of "let the

buyer beware".

12. The defendant tried to collect on the judgments. This included a garnishment action.

13. The Court finds that at all times Kenneth Turner acted in his individual capacity and has no individual liability as to any of the plaintiffs' claims.

14. The Court finds that the defendants, defendants' counsel and all employees in the garnishment action acted in good faith. The evidence is insufficient for the Court to conclude by preponderance of the evidence that any defendant or anyone associated with any defendant engaged in a "wrongful garnishment".

15. The Court finds that when the affidavits in support of the garnishment action were made they were made based upon an honest and good faith evaluation of the facts available to the defendants at the time.

CONCLUSIONS OF LAW

1. The Court finds and declares that the RTC released the judgments when they issued the 1099 forms. This was industry practice generally and the RTC's practice particularly from the evidence presented to the Court.

2. When the defendant purchased the guarantees evidencing the judgment in this ca they were worthless. Any recourse that exists would be between the defendant purchaser and the RTC seller. The plaintiffs herein can not be blamed if the defendant contracted away when it purchased from the RTC any recourse that it might have for purchasing worthless judgments.

3. When the 1099s were issued, in addition to the indebtedness being forgiven, each plaintiff recipient had a taxable event. They became a recipient of income based upon

a discharge of the indebtedness from the judgment creditor, and therefore could not continue to be liable on the same indebtedness that was subject to the discharge. Whether or not they paid the IRS what they owed on their 1991 1040 is of a matter that is between them and the IRS and is not before the Court.

4. The judgment involved in this case is not subject to continued enforcement.

5. The judgment being satisfied by the issuance of a 1099, that event occurring before assignment of the judgment creditor (RTC), the satisfaction thus bars the assignee (the defendant Firstrust Corporation) from enforcing the judgment.

6. There was no liability established as to any claim against Kenneth T. Turner, individually.

7. The evidence is insufficient to establish that the defendant or anyone acting in concert with the defendant engaged in a "wrongful garnishment" or that they engaged in any violation of either the Texas or Federal Debt Collection Practices Act.

8. The right to attorney's fees was not proven by any party.

9. It is the conclusion of the Court, which will be reflected in the Judgment, that all parties take absolutely nothing from any other party on any of the claims made in this lawsuit.

SO ORDERED.

Dated: October 31, 1996.

/s/ Joe Kendall
JOE KENDALL
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 96-11468

JAMES A LONG, and wife;
JAMES A KING, and wife;
RAYMOND KING, and wife;
JERRY PATE LONG, and wife;
HOMER L LONG, and wife;
KELVIN KING, and wife;
TRUMAN SMITH, and wife;
SAM FULTON, and wife;
DAVID SWEENEY, and wife;
JIMMY SWEENEY, and wife;
JAMES SWEENEY;
BOB GRAVES, and wife;
JOHN RATLIFF, and wife;
DENNIS RATLIFF, and wife;
J P RATLIFF, and wife

Plaintiffs - Counter Defendants - Appellees
Cross - Appellants

GAYLE LONG; MARY ANN KING; MINNIE LEE KING; SUSIE LONG; ANN LONG; SHARON KING; NADAIAH SMITH; MADGE FULTON; SUE SWEENEY; LYNETTE SWEENEY; MARIANNA GRAVES; DIANA RATLIFF;

TONI RATLIFF; MARY BLANCHE RATLIFF

Plaintiffs - Counter Defendants - Appellees

v.

U.S. COURT OF APPEALS
FILED
MAR 26 1998
CHARLES R. FULBRUGE III
CLERK

KENNETH T TURNER, Individually

Defendant - Counter Claimant

and

FIRSTRUST CORPORATION

Defendant - Counter Claimant - Appellant
Cross Appellee

Appeals from the United States District Court for the Northern District of Texas, Wichita Falls

---

ON PETITION FOR REHEARING

Before GARWOOD, DUHÉ and DeMOSS, Circuit Judges.

PER CURIAM:

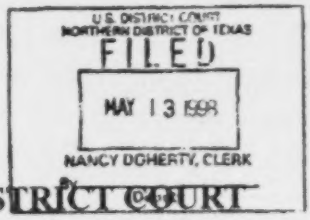
IT IS ORDERED that the petition for rehearing filed in the above case is DENIED.

ENTERED FOR THE COURT:

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

/S/ Will Garwood
United States Circuit Judge

APPENDIX E



ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

JAMES A. LONG, et al,	§	
	§	
Plaintiffs	§	
	§	
v.	§	Case No. 7:95-CV-002-X
	§	
	§	
KENNETH T. TURNER,	§	ENTERED ON DOCKET
et al,	§	_____ PURSUANT
	§	TO F.R.C.P. RULES
	§	58 AND 79a
Defendant	§	

FINAL JUDGMENT ON MANDATE AFTER APPEAL

A certified copy of the opinion of the United States Court of Appeals, Fifth Circuit. and direction as to costs, that were issued as the mandate under FRAP 41. on April 10, 1998, were filed in this Court, whereby it appears that on February 6, 1998, upon appeal by Firstrust Corporation defendant - counter claimant - appellant - cross-appellee and James A. Long, and wife; James A. King, and wife; Raymond

King, and wife; Jerry Pate Long, and wife; Homer L. Long, and wife; Kelvin King, and wife; Truman Smith, and wife; Sam Fulton, and wife; David Sweeney, and wife; Jimmy Sweeney, and wife; James Sweeney, Bob Graves. and wife; John Ratliff, and wife; Dennis Ratliff, and wife; J. P. Ratliff, and wife, plaintiffs - counter defendants -appellees - cross appellants, Gayle Long, Mary Ann King, Minnie Lee King, Susie Long, Ann Long, Sharon King, Nadaiah Smith, Madge Fulton, Sue Sweeney, Lynette Sweeney, Mariana Graves, Diana Ratliff, Toni Ratliff, and Mary Blanche Ratliff, Plaintiffs-Counter Defendants -Appellees. from the judgment of this Court dated October 31, 1996, the said Court of Appeals affirmed this Court's decision denying attorney's fees to both parties and reversed and rendered the declaratory judgment, in the following words:

> "Appellant and appellees (by cross-appeal) each complain of the district court's denial of their respective requests for an award of attorney's fees. We reject all these contentions, concluding that neither appellant nor appellees have demonstrated reversible error in the district court's rulings in this respect.
>
> We conclude that the district court erred by granting any relief to appellees other than Dennis Ratliff, John Ratliff and Truman Smith, and that as to said three appellees no relief should be awarded other than a credit on their liability on the principle amount of the August 1990 judgment in the amount of $1,059.39 each for Dennis Ratliff and John Ratliff and $1,050.00 for Truman Smith (said credit in each case to be as of the date each of said parties respectively paid said amounts to

> the IRS in respect to the 1099As issued them by New MeraBank)"

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED by this Court as follows:

1. That the said mandate, consisting of a certified copy of the opinion of the United States Court of Appeals, Fifth Circuit, and its directions as to costs, be, and hereby is, made the order of this Court.

2. The following portion of this Court's final judgment dated October 31, 1996, is hereby set aside and held for naught and said portion is:

> "This case having come to trial before the Court, in accordance with the Findings of Fact and Conclusions of Law filed today, the Court declares that the Resolution Trust Corporation released judgments against the Plaintiffs based on a Note and Guarantee Agreements Plaintiffs had signed, so that Defendants cannot now collect from the Plaintiffs on those judgments."

3. That Dennis Ratliff, John Ratliff, and Truman Smith be and hereby are, granted a credit on their liability on the principle amount of the August, 1990 judgment in the amount of $1,059.39 each for Dennis Ratliff and John Ratliff and $1,050.00 for Truman Smith, each as of April 15, 1992.

IT IS FURTHER ORDERED that except for the credit on the principle amount of the August, 1990, judgment for Dennis Ratliff, John Ratliff, and Truman Smith as set out

above, James A. Long, James A. King, Raymond King, Jerry Pate Long. Homer L. Long, Kelvin King, Truman Smith, Sam Fulton, David Sweeney, James Sweeney, Bob Graves, John Ratliff, Dennis Ratliff, J. P. Ratliff, Gayle Long, Mary Ann King, Minnie Lee King, Susie Long, Ann Long, Sharon King, Nadaiah Smith, Madge Fulton, Sue Sweeney, Lynette Sweeney, Mariana Graves, Diana Ratliff, Toni Ratliff, Mary Blanche Ratliff, take nothing against Firstrust Corporation by reason by their cause of action for a declaratory judgment.

IT IS FURTHER ORDERED that except for the credit on the principle amount of the August, 1990 judgment granted to Dennis Ratliff, John Ratliff and Truman Smith herein, the August, 1990 judgment is in full force and effect and Firstrust Corporation may collect the same from the judgment debtors thereon, James A Long, James A. King, Raymond King, Jerry Pate Long, Homer L. Long. Kelvin King, Truman Smith, Sam Fulton, David Sweeney, Jimmy Sweeney, James Sweeney, Bob Graves, John Ratliff, Dennis Ratliff, and J. P. Ratliff.

IT IS FURTHER ORDERED that except as specifically set out herein all parties take nothing on their claims against each other, and that each party shall bear his own cost and attorney's fees.

SO ORDERED this 13th day of May, 1998.

/s/ Joe Kendall
Joe Kendall
U.S. District Judge

AGREED TO AS FORM:

/s/ Charles B. Russell
Charles B. Russell
State Bar No. 17433000
Attorney for Firstrust Corporation

Supreme Court, U.S.
FILED
JUL 24 1998
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No. 98-1

In The

Supreme Court of the United States

October Term, 1997

JAMES A. LONG, JAMES A. KING, RAYMOND KING, JERRY PATE LONG, HOMER L. LONG, KELVIN KING, TRUMAN SMITH, SAM FULTON, DAVID SWEENEY, JIMMY SWEENEY, JAMES SWEENEY, BOB GRAVES, JOHN RATLIFF, DENNIS RATLIFF and J.P. RATLIFF,

Petitioners,

vs.

FIRSTRUST CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

CORPORATE DISCLOSURE STATEMENT

Respondent, Firstrust Corporation, has no parent company or nonwholly owned subsidiary company.

TABLE OF CONTENTS

	Page
Parties to the Proceeding	i
Corporate Disclosure Statement	i
Table of Contents	ii
Table of Citations	iv
Statutes and Regulations Involved	1
Misstatements of Fact or Law in the Petition	4
Statement of the Case	5
A. Nature of the Case	5
B. Course of Proceedings and Disposition in the United States District Court	5
C. Judgment and Opinion of the United States Court of Appeals	6
D. Final Judgment on Mandate After Appeal	7
Reasons for Denying the Writ	7
I. The Petition Should Be Denied For The Following Reasons	7
A. Preemption Analysis	7

Contents

	Page
B. Petitioners' Case Is Moot	13
C. Waiver	14
D. De Novo Standard of Review	14
E. Estoppel	14
Conclusion	15

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Erie R. Co. v Tompkins, 304 US 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 ALR 1487 (1938) 8

Hyundai Motor Co., et al. v. Alvarado, et al., 1998 Tex. LEXIS 87, 41 Tex. Sup. J. 947 8

Keado v. United States, 853 F.2d 1209 (5th Cir. 1988) 13

Medtronic, Inc. v Lohr, 518 U.S. 470, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996) 9

Nimrod Marketing (Overseas), Ltd. v. Texas Energy Investment Corp., 769 F.2d 1076 (5th Cir. 1985), *cert. denied*, 475 U.S. 1047, 106 S. Ct. 1266, 89 L. Ed. 2d 575 (1986) 13

Salve Regina College v Russell, 499 US 225, 113 L. Ed. 190, 111 S. Ct. 1217 14

Youakim v Miller, 425 US 231, 47 L Ed. 2d 701, 96 S. Ct. 1399 14

Contents

Page

Statutes Cited:

26 U.S.C. § 6050J 1, 2, 7, 9, 10

26 U.S.C. § 6050P 3, 4, 11

Regulations Cited:

Internal Revenue Service Regulations for § 6050J, 49 FR 34459 ..... 2, 9, 10

Internal Revenue Service Regulations for § 6050P .. 4, 11, 12

STATUTES AND REGULATIONS INVOLVED

A. 26 U.S.C.A. § 6050J, that provides in relevant part:

6050J. *Returns relating to foreclosures and abandonments of security.*

(a) In general. Any person who, in connection with a trade or business conducted by such person, lends money secured by property and who

. . .

(2) has reason to know that the property in which such person has a security interest has been abandoned, shall make a return described in subsection (c) with respect to each of such acquisitions or abandonments, at such time as the Secretary may be regulations prescribed.

. . .

(c) Form and manner of return. The return required under subsection (a) with respect to any acquisition or abandonment of property

(1) shall be in such form as the Secretary may prescribed,

(2) shall contain

(A) the name and address of each person who is a borrower with respect to the indebtedness which is secured,

> (B) a general description of the nature of such property and such indebtedness,
>
> . . .
>
> (D) in the case of a return required under subsection (a)(2), the amount of such indebtedness at the time of such abandonment, and
>
> (E) such other information as the Secretary may prescribe. . . .

B. Internal Revenue Service Regulations For § 6050J, 49 FR 34459 that provide in relevant part:

> Abandonments:
>
> Q-17: For purposes of this reporting requirement, when has an abandonment occurred?
>
> A-17: An abandonment has occurred when the objective facts and circumstances indicate that the borrower intended to and has permanently discarded the property from use.
>
> Q-18: Does the fact that a lender knows or has reason to know of an abandonment of property securing a loan mean that the borrower is entitled to an abandonment loss?
>
> A-18: No. The definition of an abandonment of property securing a loan in A-17 applies only for purposes of this reporting

> requirement and is not intended to apply for other purposes, such as determining whether a borrower would be entitled to an abandonment loss.

C. 26 U.S.C.A. § 6050P that provides in relevant parts:

> *Returns relating to the cancellation of indebtedness by certain financial entities.*
>
> (a) In general.
>
> Any applicable financial entity which discharges (in whole or in part) the indebtedness of any person during any calendar year shall make a return (at such time and in such form as the Secretary may by regulations prescribe) setting forth —
>
> (1) the name, address, and TIN of each person whose indebtedness was discharged during such calendar year,
>
> (2) the date of the discharge and the amount of the indebtedness discharged, and
>
> (3) such other information as the secretary may prescribe.

The amendments made by this section apply to discharges of indebtedness after December 31, 1993, except that in case of a governmental entity, it applies to discharges of indebtedness after August 10, 1993.

D. Internal Revenue Service Regulations for § 6050P that provide in part:

> B. Facts and circumstances indicating that an indebtedness has not been discharged include . . . the sale or packaging for sale of the indebtedness by the creditor . . .
>
> Further, no additional reporting or Form 1099-C correction is required if a creditor receives a payment of all or a portion of a discharged indebtedness reported under this section for a prior calendar year.

MISSTATEMENTS OF FACT OR LAW IN THE PETITION

The Respondent, Firstrust Corporation, respectfully addresses the following perceived misstatements of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted. The perceived misstatements of fact or law in the petition are:

a. On page 3 Petitioners refer to 26 U.S.C. § 6050P as one of the statutory provisions involved. This is a misstatement of law. The subject 1099A forms were mailed to the male plaintiffs in January, 1992. 26 U.S.C. § 6050P states that it applies to discharges of indebtedness after December 31, 1993, with the exception that as to governmental entities, said section applies to discharges of indebtedness after August 10, 1993, with the result that such § 6050P was not in effect at any time material to this case.

b. Petitioner's statement on page 4 of their petition that the issuance of the subject 1099A forms was done in conjunction

with the "write-off" of the debt on the records of the institution is a half truth in that it omits the material information that there was a contemporaneous transfer of the loan file to the Asset Recovery Division of the Resolution Trust Corporation and later packaging and sale of the subject judgment and other judgments by the Resolution Trust Corporation to Firstrust Corporation.

c. Petitioners state that the 1099A's were a report to the IRS of a discharge of the subject 1990 judgment. As stated in footnote 8 in the Opinion of the United States Court of Appeals for the Fifth Circuit, the 1099A's had more to do with complying with what was thought to be required by the IRS or RTC Regulations, and had more been intended doubtless some more customary or formal method of handling the matter would have been employed.

STATEMENT OF THE CASE

Respondent believes that the Statement of the Case made by Petitioners is incorrect and incomplete and makes the following Statement of the Case.

A. Nature of the Case

1. This is a suit for a declaratory judgment and money damages and attorney's fees and a counter claim for recovery of attorney's fees.

B. Course of Proceedings and Disposition in the United States District Court

2. This case was tried before the Court without a jury.

3. On January 9, 1995, the Petitioner's, plaintiffs in the trial court, brought suit against the defendants Kenneth T.

Turner, individually, and Firstrust Corporation (the Respondent herein) for a declaratory judgment that they were released from liability on a judgment based upon the cause of action of quasi estoppel arising out of the issuance of a 1099A form to each male plaintiff and resulting taxable income to them and write off of the debt on the records of the Resolution Trust Corporation (RTC), and for a money judgment for wrongful garnishment, conversion, unreasonable collection efforts, and negligence and alleged individual liability of Kenneth T. Turner.

4. Respondent plead appropriate denials and affirmative defenses and a counter claim for recovery of attorney's fees.

5. The court entered its final judgment that the subject judgment had been released and that Respondent cannot now collect from the Petitioners on such judgment. The court further ordered that all parties take nothing on their claims against each other and that each party bear its own cost and attorney's fees. The final judgment is Appendix B to the Petition for Writ of Certiorari.

6. The Respondent timely filed its notice of appeal and Petitioners timely cross appealed.

C. Judgment and Opinion of the United States Court of Appeals

7. The judgment and opinion of the United States Court of Appeals for the Fifth Circuit ("Court of Appeals") is a correct statement of the case, and is set out as Appendix A to the Petition for Writ of Certiorari.

8. The Court of Appeals applied a de novo standard of review for application of State law by the District Court and made its conclusion:

> We conclude that the district court erred by granting any relief to appellees other than Dennis Ratliff, John Ratliff, and Truman Smith, and that as to said three appellees no relief should be awarded other than a credit on their liability on the principal amount of the August 1990 judgment in the amount of $1,059.39 each for Dennis Ratliff and John Ratliff and $1,050 for Truman Smith (said credit in each case to be as of the date each of said parties respectively paid said amounts to the IRS in respect to the 1099As issued them by New MeraBank).
>
> Accordingly, the judgment of the district court is affirmed in part and reversed in part, and the cause is remanded for entry of judgment in conformity herewith.

D. Final Judgment on Mandate After Appeal

9. On May 13, 1998, the United States District Court signed and filed its Final Judgment on Mandate After Appeal that is set out as Appendix E to the Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I.

THE PETITION SHOULD BE DENIED FOR THE FOLLOWING REASONS:

A. Preemption Analysis

10. As this writer understands Petitioner's position, it is that the Internal Revenue Code ("Code") § 6050J and the regulations thereunder providing for returns relating to

foreclosures and abandonments of security overruled all State laws relating to a discharge of a judgment or any other debt and expanded estoppel damages to grant a windfall to the debtors.

11. Such State laws would apparently cover statutory provisions such as the Uniform Commercial Code as well as the State's common law provisions for release of a judgment or indebtedness.

12. The Petitioners would have this Honorable United States Supreme Court overrule all State laws on discharge of a judgment and any other debt as well as expanding estoppel damages to grant a windfall to debtors arising out of a creditor's use of Internal Revenue Service reporting forms, rather than applying State law to determine whether or not a judgment has been released and, if applicable, the amount of estoppel damages, as required by *Erie R. Co. v Tompkins*, 304 US 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 ALR 1487 (1938).

13. Petitioners' argument is fatally defective, for the reason that petitioners have cited no authority for their novel position that by issuing Internal Revenue Service reporting forms 1099A the creditor cannot thereafter collect a judgment, and it is respectfully submitted that no authority is cited, because no authority exists.

14. Historically States have exercised primary authority in commercial matters concerning releases of state court judgments and discharges of indebtedness. As the Texas Supreme Court reasoned concerning an alleged preemption by Federal law in *Hyundai Motor Co., et al. v. Alvarado, et al.*, 1998 Tex. LEXIS 87, 41 Tex. Sup. J. 947,

> Thus, in all preemption cases, and particularly in those in which Congress has "legislated . . . in a

> field which the States have traditionally occupied," . . . (preemption analysis) "starts with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.

Medtronic, Inc. v Lohr, 518 U.S. 470, 116 S. Ct. 2240, 2245, 135 L. Ed. 2d 700 (1996).

> This analytical framework is crucial in our federal system, "for if in close or uncertain cases a court proceeds to preempt state laws where that result was not clearly the product of Congress's considered judgment, the court has eroded the dual system of government that ensures our liberties, representation, diversity, and effective governance." KENNETH STARR ET AL., THE LAW OF PREEMPTION: A REPORT OF THE APPELLATE JUDGES CONFERENCE, AMERICAN BAR ASSOCIATION (*12) 40 (1991); *see also Hernandez-Gomez v Leonardo,* 180 Ariz. 297, 884 P.2d 183, 190 (Ariz. 1994) (noting that a rule requiring explicit indication of preemptive intent "transfers the decision about preemption and its reach from the post-hoc speculation of lawyers to the forum where it should be argued: the legislature, where the competing interests may be reconciled before the statute is passed"), vacated, 514 U.S. 1094, 115 S. Ct. 1819, 131 L. Ed. 2d 742 (1995).

15. Under Petitioner's preemption analysis the IRS reporting forms 1099A conclusively establish against the creditor a release of the subject 1990 judgment.

16. It is respectfully submitted that it is a bizarre argument to state that the Code § 6050J and regulations thereunder, neither

of which mention a release of indebtedness, have impliedly overruled all State laws on a release of a judgment or other indebtedness.

17. Such a rule would certainly be a surprise to the Internal Revenue Service.

18. The subject IRS 1099A forms were issued under § 6050J of the Code for returns relating to foreclosures and abandonment of security and the IRS regulations thereunder. Under such regulations, the IRS 1099A forms are for reporting purposes only and cannot be used to determine whether a borrower would be entitled to an abandonment loss by the following language:

> Abandonments:
>
> Q-17: For purposes of this reporting requirement, when has an abandonment occurred?
>
> A-17: An abandonment has occurred when the objective facts and circumstances indicate that the borrower intended to and has permanently discarded the property from use.
>
> Q-18: Does the fact that a lender knows or has reason to know of an abandonment of property securing a loan mean that the borrower is entitled to an abandonment loss?
>
> A-18: No. The definition of an abandonment of property securing a loan in A-17 applies only for purposes of this reporting requirement and is not intended to apply for other

> purposes, such as determining whether a borrower would be entitled to an abandonment loss.

19. If the subject IRS 1099A form cannot be used to determine whether a borrower would be entitled to an abandonment loss, how can such form conclusively establish against a creditor a release of the subject 1990 judgment?

20. While Respondent continues to insist that 26 U.S.C. § 6050P, providing for returns related to the cancellation of indebtedness by certain financial entities, does not apply to this case, for the reason that it was not in effect at any material time, the Internal Revenue Service did provide in the regulations under § 6050P for collection of an indebtedness after a report of a discharge of such indebtedness by a provision of the Internal Revenue Service regulations for § 6050P and IRS form 1099C as follows:

> Further, no additional reporting or Form 1099-C correction is required if a creditor receives a payment of all or a portion of a discharged indebtedness reported under this section for a prior calendar year.

21. If, as advocated by Petitioners, the Internal Revenue Code prevented further collection of an indebtedness for which a report of discharged indebtedness under the Internal Revenue Service forms 1099C had been made, what is the purpose of the above quoted provision?

22. Such regulation under § 6050P also states in part:

> B. Facts and circumstances indicating than an indebtedness has not been discharged include . . .

> the sale or packaging for sale of the indebtedness by the creditor. . . .

23. As correctly noted in the opinion of the United States Court of Appeals for the Fifth Circuit, the RTC sold the subject judgment to Respondent. Under the above quoted provision of the subject IRS Regulation, the judgment had not been released.

24. Petitioners do not contend that under State law the judgment was released. That the Petitioners did not owe the judgment or that they paid the same was never contended. What is contended by Petitioners is simply that they are entitled to a windfall of a release of the judgment.

25. Petitioners' Petition for Writ of Certiorari should be denied for the following reasons:

a. The purpose of the Internal Revenue Code ("Code") and Internal Revenue Service ("IRS") regulations are to raise tax revenue and not to adjudicate property rights among third parties.

b. There is no conflict between State law and the Code, for the reason that State law governs when a judgment has been released and the Code governs whether or not any cancellation of indebtedness resulting therefrom is taxable.

c. Under the Internal Revenue Service regulations the subject IRS 1099A forms are for reporting purposes only and cannot be used for a proof of an abandonment or discharge of indebtedness.

d. 26 U.S.C. § 6050P for reports by financial institutions of a discharge of indebtedness is not a statutory provision involved in this case, for the reason that it was not in effect during any material times in this case, and in the alternative, the IRS regulations thereunder support Respondent's position.

B. Petitioners' Case Is Moot

26. Petitioners' lawsuit is moot. In support of this position, Respondent would respectfully show that Petitioners' sole cause of action in the United States District Court to prevent collection of the judgment was based upon the State of Texas legal doctrine of quasi estoppel. Petitioners failed to prove the elements of quasi estoppel in the trial court and the United States District Court judge made no findings of fact thereon. For such reason, this Petition for a Writ of Certiorari should be denied.

27. In the alternative, assuming for purposes of argument only, that petitioners are entitled to any relief under quasi estoppel, recovery under an estoppel theory is limited to the amount necessary to compensate for the loss suffered. One recovering under promissory estoppel should not experience a windfall. *Nimrod Marketing (Overseas), Ltd. v. Texas Energy Investment Corp.*, 769 F.2d 1076, 1080 (5th Cir. 1985), *cert. denied*, 475 U.S. 1047, 106 S. Ct. 1266, 89 L. Ed. 2d 575 (1986); *Keado v. United States*, 853 F.2d 1209, 1218 (5th Cir. 1988).

28. Petitioners received all of the relief to which they were entitled when petitioners Dennis Ratliff and John Ratliff received a credit on the subject August, 1990, judgment in the amount of $1,059.39 each and Truman Smith received a credit for $1,050.00, as their actual damages for income taxes paid

because of the 1099A forms, and petitioners are not entitled to a windfall of a release of the entire judgment. Petitioners' petition for a writ of certiorari should be denied, for the reason that Petitioners' suit is moot.

C. Waiver

29. The argument now raised by Petitioners in their Petition for Writ of Certiorari was not raised or resolved in the lower Courts and was first made by Petitioners in their, "Motion For Stay Of Mandate Pending Petition For Writ Of Certiorari" and was, therefore, waived.

30. Ordinarily, this Honorable United States Supreme Court does not decide questions not raised or resolved in the lower Court. *Youakim v Miller,* 425 US 231, 47 L Ed. 2d 701, 96 S. Ct. 1399. For such reason, the petition should be denied.

D. De Novo Standard of Review

31. The United States Court of Appeals for the Fifth Circuit correctly applied a de novo standard of review to determine that under State law the judgment had not been released. *Salve Regina College v Russell,* 499 US 225, 113 L. Ed. 190, 198, 111 S. Ct. 1217.

E. Estoppel

32. Twenty-one of the petitioners did not report income from the 1099A forms on their respective income tax returns filed with the IRS, and are, therefore, estopped to make the argument now made to this Court.

CONCLUSION

It is respectfully submitted that Respondent has conclusively demonstrated that the petition should be denied.

Respectfully submitted,

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Petitioners,

v.

FIRSTRUST CORPORATION,

Respondent.

Petition For Writ of Certiorari
To The United States Court of Appeals
For the Fifth Circuit

REPLY TO BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether state law may permit further collection of a debt after a financial entity has made a report of cancellation of debt income to the Internal Revenue Service and the debtor, pursuant to federal statutes.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

I. ANY ISSUES PRESENTED BY 26 U.S.C. §6050J HAVE PREVIOUSLY BEEN DETERMINED AGAINST RESPONDENT, AND ARE NOT SUBJECT TO RECONSIDERATION 1

II. PETITIONERS HAVE NOT WAIVED THEIR RIGHT TO CLAIM FEDERAL STATUTORY PREEMPTION, IN THAT SUCH ISSUE HAS BEEN RAISED IN THE LOWER COURTS 2

CONCLUSION 5

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

Reported Cases:

Capital Cities Cable, Inc., v. Crisp,
467 U.S. 691, 81 L.Ed.2d. 580 (1984) 4

Lynk v. La Porte Superior Court No. 2,
789 F.2d 554 (7th Cir. 1986) 3

Statutes:

26 U.S.C. § 61(a)(12) 2
26 U.S.C. § 108 3
26 U.S.C. § 6041, et seq. 3
26 U.S.C. § 6050J 1, 2

Rules:

Supreme Court Rule 14(1)(a) 4

APPENDIX

APPENDIX A —
Excerpts from Brief for Appellees and
Cross-Appellants 1

APPENDIX B —
Excerpts from Appellees' Petition for
Rehearing 8

I. ANY ISSUES PRESENTED BY 26 U.S.C. §6050J HAVE PREVIOUSLY BEEN DETERMINED AGAINST RESPONDENT, AND ARE NOT SUBJECT TO RECONSIDERATION

Respondent asserted in the trial of this cause that the issuance of a 1099A information return would only have been issued on a foreclosure or abandonment of security, or a reason other than to show receipt of income on cancellation of an indebtedness. The District Court sustained Petitioners' objection to any evidence on Respondent's theory, in that Respondent had previously made a formal admission that the 1099 form issued in this case related to the judgment. Further, the Court disallowed any evidence on such theory based upon the Respondent's response to a request for admission that the subject indebtedness was secured only by the individual guaranties.

Respondent's Brief In Opposition merely seeks to reargue the same evidentiary position asserted by Respondent in the trial of this cause, and Respondent was not only prohibited from offering testimony on any theory regarding foreclosure or abandonment of collateral as being the cause of the issuance of the 1099A form, but also the District Court in its Findings of Fact and Conclusions of Law found that the issuance of the 1099A forms "...evidenced their intent to forgive the debt and the issuance of the 1099A forms, from their practice, did indeed evidence their intent to write-off the judgment." This finding by the District Court was amply supported by the evidence offered by Petitioners, including testimony by two expert witnesses who testified that the 1099A form was used by institutions during the relevant time period to show an income transaction based upon discharge of debt.

Respondent's reliance upon 26 U.S.C. 6050J merely attempts to divert attention from the principal statute at issue, being 26 U.S.C. 61(a)(12), and whether the "income from discharge of indebtedness," as that term is used in the federal statute, is determined by state law or federal law.

Petitioners' argument is not bizarre as claimed by Respondent in its Brief In Opposition, but rather presents a clear question of federal statutory preemption. Respondent's analysis in its Brief In Opposition fails to recognize the critical element in this cause regarding cancellation of debt income that is governed by federal law, rather than state law issues concerning a contractual release. Issues of a contractual release, including intent, consideration, mutuality, and accord and satisfaction, and issues regarding gift and windfall, are irrelevant in the context of determining cancellation of debt income.

II. PETITIONERS HAVE NOT WAIVED THEIR RIGHT TO CLAIM FEDERAL STATUTORY PREEMPTION, IN THAT SUCH ISSUE HAS BEEN RAISED IN THE LOWER COURT.

Petitioners have consistently plead and argued throughout this entire case that the federal statutes regarding the determination of income from discharge of indebtedness, and the corollary statutes and regulations which govern information returns, control this dispute. Further, Petitioners have consistently argued that the state law asserted by Respondent, including issues of a contractual release, gift, and windfall, are not determinative of this dispute and, in fact, are irrelevant in the context of determining cancellation of debt income. The statutes have included 26 U.S.C. § 61(a)(12); 26 U.S.C. § 108, and 26 U.S.C. § 6041, et seq. Petitioners relied

on these statutes in the District Court, and the District Court found that the discharge of the debt, as evidenced by the issuance of the 1099A forms and the write-off of the debt on the books of the institution, created a taxable event and that the judgment debtors were recipients of income based upon the discharge of the indebtedness from the judgment creditor. It is obvious that the District Court gave controlling effect to the federal statutes with regard to its findings that there was a "discharge of the debt," "taxable event" and "recipient of income."

Further, the Fifth Circuit's characterization of the dispute as "...the legal significance of IRS forms 1099A..." necessarily encompasses the federal statutes which determine the requirements of the 1099 forms, and the federal statutes which would relate to cancellation of debt income. The Fifth Circuit fails to address these federal statutes, but the District Court findings and the characterization of the dispute by the Fifth Circuit show that the controlling or preemptive effect of the federal statutes had been properly raised. Federal questions raised in the lower court, even if not addressed by the lower court, may properly be considered by the United States Supreme Court. *Lynk v. La Porte Superior Court No. 2*, 789 F.2d 554 (7th Cir. 1986).

Additionally, in order to show that the specific issue involving the controlling effect of the federal statutes was properly before the Fifth Circuit, excerpts are included herein from Petitioners' Brief for Appellees and Cross-Appellants (Appendix A) and Petitioners' Appellees Petition for Rehearing (Appendix B). Respondent has agreed that this specific issue was raised in the Fifth Circuit by Petitioners' Motion for Stay of Mandate Pending Petition for Writ of Certiorari.

Respondent has not contended that the issue was not properly raised in Petitioners' Petition for Writ of Certiorari, and, Petitioners have duly complied with Supreme Court Rule 14(1)(a). This Court has granted certiorari when the question of federal statutory preemption was not raised by the petition, but had been presented in an amicus brief. *Capital Cities Cable, Inc., v. Crisp*, 467 U.S. 691, 81 L.Ed.2d. 580 (1984). Petitioners submit that the issue presented in the Petition for Writ of Certiorari, and duly argued and presented in the lower courts, presents a proper question to submit to the Supreme Court.

CONCLUSION

This case presents issues of importance to the administration of federal law, and Petitioners respectfully request this that the Supreme Court grant Certiorari to review these issues.

Respectfully submitted,

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APPENDIX A

ARGUMENT AND AUTHORITIES

Issue No. 1:

Whether there is any evidence or legally sufficient evidence to support the findings that issuance of the 1099A forms by the RTC evidenced their intent to forgive the debt and to write off the judgment debt, the write off of the judgment debt and issuance of the 1099A forms was inconsistent with the further enforcement of the judgment, the judgment debt was forgiven, and the banking industry generally and RTC particularly intended to forgive debt when they issued 1099A forms to borrowers or judgment debtors, and resulting judgment that the Resolution Trust Corporation released the judgment against the male plaintiffs so that Firstrust Corporation cannot now collect from the male plaintiffs on the judgment.

Standard of Review: The standard of review is

"clearly erroneous" for the findings of fact and "de novo" for conclusions of law.

Plaintiffs' theory on their claim for declaratory judgment relief is based upon actions of New MeraBank Texas, FSB, a prior owner and holder of the subject judgment. It was undisputed and the District Court found that the institution caused to be issued a form 1099A to each of the male Plaintiffs for the tax year 1991. (Record Excerpts, Item D). Defendant admitted that the 1099 forms had been issued in regard to the subject judgment. (R. 4, p. 1068; Plaintiffs' Exhibit No. 289). The District Court found that a write off of the judgment debt and the issuance of the 1099 forms was inconsistent with the further enforcement of the judgment, and that the judgment debt had been forgiven. (Record Excerpts, Item D). Based upon these findings, the District Court found that the institution released the judgments when they issued the 1099 forms, in accordance with the industry

practice and in accordance with the practice of institutions under government supervision. (Record Excerpts, Item D). Further, the District Court concluded that the judgment in this case was not subject to continued enforcement, and that the satisfaction of such judgment would bar any assignee from enforcement the judgment. (Record Excerpts, Item D).

The Plaintiffs' theory in this case involves the concept of cancellation of debt income. A taxpayer is generally treated as realizing taxable income if a debt he owes is forgiven. Pursuant to 26 U.S.C. § 61(a)(12), a taxpayer must include in gross income a discharge of indebtedness. See generally, *Mertens Law of Federal Income Taxation*, Vol. 2, Chap. 12, § 11.16, et seq.; 47A C.J.S., *Internal Revenue*, § 68; 33A Am.Jur.2d, *Federal Taxation*, ¶ 12850. This general rule was first espoused in *U.S. v. Kirby Lumber Co.*, 284, U.S. 1, 76 L.Ed. 131, 52 S.Ct. 4 (1931). See also, *Colonial Sav. Assn. and Subsidiaries v. C. I. R.*, 854 F.2d 1001 (7th Cir.

1988), reh. denied, cert. denied, 109 S. Ct. 1556, 489 U.S. 1090, 103 L.Ed. 2d 859.

Under the provisions of the Internal Revenue Code, every person made liable for any tax imposed by the Code must make such returns and comply with rules and regulations as may be prescribed. 26 U.S.C. §§ 6001, 6011. The Code makes provision for filing information returns if there has been a taxable event which may result in reportable income. 26 U.S.C. § 6031, et. seq. These specific provisions regarding the issuance of 1099 forms are contained in Subpart B in Subtitle F, Chapter 61, of the Internal Revenue Code. In this subpart, the various Code sections specify when information returns must be filed to report to the Internal Revenue Service and the individual involved that payments have been made to the individual or other transactions have been entered into which give rise to income. The 1099 forms are the information returns used to report these transactions.

Effective after 1993, the provisions of 26 U.S.C. § 6050P specifically relate to discharge of debt by certain financial institutions. Prior to that time there existed some confusion with regard to the proper information return form in which to make the report of cancellation of debt. (R. 7, pp. 269, 273, 274, 286). Regardless of the suffix on the 1099 form, it is clear that at the time the 1099A form was issued in this case, there was recognition that a taxable gain existed for cancellation of debt. *Malone v. United States*, 326 F.Supp. 106 (N.D. Miss. 1971) affirm. 455 F.2d 502 (5th Cir. 1972).

A further statutory reference that is relevant to this dispute is 26 U.S.C. § 108. Defendant has contended that if the report of cancellation of debt income to the Plaintiffs did not create an actual tax liability, then the Plaintiffs would not be entitled to claim relief from the judgment. Section 108 of Title 26 provides certain situations in which income from discharge of indebtedness would not be included in the

taxpayer's report of gross income. It is submitted that if Defendant intended to carry his burden, he would first have to show that the taxpayers were not excluded from showing the reported income as gross income.

Based upon the circumstances surrounding the write-off and issuance of the 1099 forms to the male Plaintiffs, the conclusion was formed, and well-supported by the evidence in this case, that there had been a discharge of the indebtedness represented by the judgment. Any further attempt to seek enforcement of the judgment, either by the original owner and holder of the judgment, or by its assignee(s), would be inconsistent with the prior actions. Defendant's own expert, Michael D. Pierce, recognized that continued collection efforts on the judgment would be inconsistent with previous actions showing cancellation of debt income to the judgment defendant. (R. 9, p. 147). Defendant did not dispute that continued collection efforts on

the judgment would be inconsistent with actions showing cancellation of debt income. Even though not directly addressing the 1099 issue, there is case authority which recognizes that the imposition of a taxable gain on discharge of debt is inconsistent with continued litigation on the underlying debt. *Exchange Security Bank v. United States*, 345 F.Supp. 486 (N.D. Ala. 1972), rev'd on other grounds, 492 F.2d 1096 (5th Cir. 1974).

APPENDIX B

ARGUMENT AND AUTHORITIES

Issue No. 1:

Whether the Appellate Court has erred in failing to give proper legal effect to the issuance of a 1099 tax form.

The decision of this Appellate Court is in direct conflict with an existing Federal statute, and the implementation of this decision will create enormous uncertainty between lenders/creditors,debtors/taxpayers, and the Internal Revenue Service. The finding of this Court is that the issuance of a 1099 tax form, based upon a decision to forgive a debt, does not cause a discharge of the debt. The Court does not make any apparent distinction between a judgment debt, and any other debt arising by note or contract. As described in the Brief for Appellees, 26 U.S.C. § 6050P became effective in 1993 in order to clarify the requirement for the issuance of a 1099 on discharge of indebtedness.

Previously, there had been some confusion regarding the appropriate 1099 to issue, but the testimony in the present case was that the 1099A form had been used by institutions prior to the passage of Sec. 6050P. The statute now provides that any applicable financial entity that discharges (in whole or in part) the indebtedness of any person during any calendar year is required to file a return setting fourth specific information. The code makes provision for filing information returns if there has been a taxable event which may result in reportable income. 26 U.S.C. § 6031, et. seq. The specific provisions regarding the issuance of 1099 forms are contained in Subpart B in Subtitle F, Chapter 61, of the Internal Revenue Code. The return is required whether or not the debtor is subject to tax on the discharge, and the financial entity is not required to determine whether the discharge is excludable from the reported income. 34 Am.Jur.2d, *Federal Taxation*, ¶ 60231 (1996). It is significant that this

information return is a legal requirement of the issuing entity, and it has previously been discussed that the receipt of the 1099 tax form on discharge of indebtedness is a taxable event, constituting "cancellation of debt income." 26 U.S.C. § 61(a)(12). The reported income may be excludable from the taxpayer's return based upon varying circumstances. 26 U.S.C. § 108. This Appellate Court has created an incongruous situation which would allow a financial entity to cause the issuance of a 1099 report of income to a borrower, which creates a potential tax liability to the borrower/taxpayer, and leaves the taxpayer legally liable on the full debt. This Court has found that this is a proper result even though the financial entity has made a conscious and deliberate decision to discharge the indebtedness. In other words, the financial entity can "cancel the debt," and potentially receive a tax benefit (loss), but thereafter collect the debt as if it was not "canceled." The borrower/taxpayer

should certainly be entitled to challenge, as Appellees did in this case, that they have been reported to the Internal Revenue Service as receiving cancellation of debt income, on which a tax liability may arise, and yet they remain liable as if the debt had not been canceled by the financial entity. Certainly, the borrow/taxpayer should be able to challenge the financial entity as to any right it had to cancel the debt, report income to the borrower, and yet collect or assign for collection the underlying debt. This result seems intolerable under the current requirements of Sec. 6050P, and intolerable prior to passage of Sec. 6050P, when the institution was utilizing the 1099A form to report cancellation of debt income to the Internal Revenue Service.

Further aggravating this situation would be the conflicts and potential challenges arising from whether the Internal Revenue Service can compel a report of cancellation of debt income on the taxpayer's return and still leave the

taxpayer subject to liability for the full debt. The consequences of this Appellate Court's decision are enormous.